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Eddy N. Betenson, et al. v. Call Auto & Equipment Sales, Inc., a Utah Corporation, et al. and Eugene L. Lowin and Geneva Lowin v. Call Auto & Equipment Sales, Inc., a Utah Corporation, et al. : Appellants' Reply Brief

Utah Supreme Court

IN THE SUPREME COURT OF THE

STATE OF UTAH

EDDY N. BETENSON, et al., Plaintiffs-Appellants, vs. CALL AUTO & EQUIPMENT SALES, INC., a Utah corporation, et al., Defendants-Respondent.	CASE NO. 17600
EUGENE L. LOWIN and GENEVA LOWIN, Plaintiffs-Appellants, vs. CALL AUTO & EQUIPMENT SALES, INC., a Utah corporation, et al., Defendants-Respondents.	

APPEALS FROM JUDGMENTS
OF THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY , UTAH
HONORABLE JAMES S. SAWAYA, JUDGE

APPELLANTS' REPLY BRIEF

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APPELLENTS' REPLY BRIEF

INTRODUCTION

Respondent does not dispute that one loaning money to a motor vehicle dealer is entitled to the protection of the dealer's bond required by Utah law. Respondent contends, however, that the Complaints in these actions were properly dismissed and that Appellants should not be given leave to amend the Complaints because Appellants supposedly alleged in their Complaints that

they were joint venturers with Call Auto & Equipment Sales, Inc. ("Call Auto"), the dealer covered by the bond issued by Respondent, which supposed allegation Appellants should not now be allowed to contradict by Amended Complaints, because Appellants did not supposedly seek leave to amend their Complaints in a timely fashion, and because even if the Appellants were not joint venturers with Call Auto but rather made loans to Call Auto, that such loans were supposedly usurious and Appellants cannot recover anything on the transactions, not even the principal amount of the loans. For the reasons hereinafter set forth, it is respectfully submitted that these contentions are without merit and that the Judgments appealed from should be reversed.

I. APPELLANTS HAVE NOT JUDICIALLY ADMITTED THEY WERE JOINT VENTURERS WITH DEFENDANT CALL AUTO.

Respondent argues (R.B. 6-7)[1] that Appellants have alleged in their Complaints that they were engaged in joint ventures with Call Auto & Equipment Sales, Inc., and that such allegations constitute judicial admissions so that there was no issue to be determined by the Court or Jury concerning the relationship between the parties. This contention is groundless for a number of reasons.

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[1] Respondent's Brief is cited as "R.B._____".
Appellants' Opening Brief is cited as "A.B._____".
The Betenson record is cited as "B.R._____".

A. Appellants Have Not Alleged In Their Complaints That They Were Engaged In Joint Ventures With Call Auto.

Respondent claims that in paragraph 7 of the Betenson Complaint, Appellants have alleged the existence of a joint venture between the parties. As is clear from a reading of that paragraph, the Betenson Appellants simply allege therein the representations which were made by Defendants when they approached Appellant Betenson for money. The paragraph does not allege that a joint venture was entered into or ever existed between the parties. To the contrary, the factual allegations contained in paragraph 7 make it clear that the "joint venture" term used by the Defendants in soliciting Appellants did not accurately describe the relationship at all. Thus, it is alleged that Defendants solicited Plaintiff Betenson for the purpose of raising funds for the corporate Defendants which those Defendants needed to purchase equipment in their business. It is further alleged that the money would be at all times fully secured and that Plaintiff Betenson would receive a guaranteed profit. No where is there any allegation that any of the Appellants would have anything to do with the ownership, management or operation of the business or have any right of control over that business or that the return on Appellants' money would in any way be dependent upon the amount of profits earned in the business or that Appellants would be responsible in any way for any losses of the business.

Under the authorities cited in our opening Brief (A.B. 9-15), it is clear that the foregoing allegations do not constitute allegations sufficient to give rise to the creation of a joint venture. The fact that Defendants used the term "joint venture" in soliciting one of the Appellants is totally irrelevant. The situation is no different than if Defendants had solicited Appellants to give them a "gift" of $5,000.00 on the condition that within one year Defendants would guarantee to repay that "gift" with a guaranteed profit. The mere characterization of the transaction as a "gift" would be meaningless and it would be clear to everyone that the transaction legally constituted a loan.

Paragraph 9 of the Betenson Complaint makes it even more clear that the Betenson Appellants have not alleged that they entered into a joint venture with any of the Defendants:[2]

> "On or about April 4, 1980, Plaintiff Eddy N. Betenson . . . entered into a written agreement with Defendant Call Auto & Equipment Sales, Inc. . . . pursuant to which Betenson agreed to and did pay to said Defendant the sum of $7,000.00, which was to be utilized by said Defendant to purchase and sale various types of personal property and equipment in its business. In consideration for such payment, said Defendant agreed and guaranteed to pay to Betenson in various installments on or before July 4, 1980, the sum of $9,100.00 and to give to Betenson a security interest in various

[2] The same standard allegations are contained in the Complaint for the other loans made by the Betenson Appellants.

> personal property and equipment as security for such investment. . . . Thereafter the parties agreed to various extensions for the repayment of the final installment of $7,000.00 to September 8, 1980." [Emphasis added]

Nowhere in this paragraph is there any allegation of the creation of a joint venture between the parties, but simply the allegation of a debtor-creditor relationship between the parties.

In addition, even if Respondent were correct that paragraphs 7 and 8 of the Betenson Complaint allege the creation of a joint venture between the parties, the Lowin Complaint contains no such allegations. The transaction in which Mr. and Mrs. Lowin loaned money to Call Auto was completely separate from the transactions alleged in the Betenson Complaint and none of the Betenson Appellants had any involvement whatsoever in the Lowin transaction. Paragraph 7 of the Lowin Complaint simply alleges that the Lowins entered into a written agreement with Call Auto pursuant to which they paid Call Auto $30,000.00, which was to be utilized by Call Auto to purchase, refurbish and sell personal property and equipment in its business and that in consideration therefor Call Auto agreed to pay Plaintiffs the sum of $750.00 per month until April 26, 1981, at which time the Lowins would be repaid the $30,000.00, and that Plaintiffs' money would at all times be secured.

B. Even If Appellants Had Alleged In The Original Complaints That A Joint Venture Existed, Such Allegation Would Not Constitute A Judicial Admission Barring The Filing Of An Amended Complaint.

Even if Appellants had alleged in their original Complaints that a joint venture existed between the parties, Respondent's contention that such allegation constitutes a "Judicial admission" which is binding upon Appellants and that Appellants cannot amend their Complaints to plead facts "in direct contradiction" to the facts alleged in their original Complaints is erroneous.[3]

In the first place, the allegation that a "joint venture" existed would clearly be a conclusion of law and not a factual allegation. Neither the parties nor the Court are bound by conclusions of law contained in pleadings and legal conclusions cannot be judicial admissions. See, e.g., Giannon v. United States Steel Corp., 238 F.2d 544 (3rd Cir. 1956); Jones v. Piper Aircraft Corp., 18 F.R.D. 181 (M.D. Penn. 1955).

More importantly, the fact that a pleader seeks to contradict factual allegations contained in a prior pleading

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[3] In this connection, Respondent claims that Appellants "submitted the matter for decision to the lower Court upon the premise that a joint venturer is entitled to recover against a dealer's bond". This argument, as Respondent well knows, completely misstates Appellants' position before the District Court. Appellants have consistently and uniformly contended that no joint venture existed between the parties, that the transactions were loans and that one making a loan to a motor vehicle dealer is entitled to recover under the dealer's bond. See, e.g., B.R. 130 & 158.

is not a basis for denying leave to amend unless leave is sought in bad faith or unless leave to amend would seriously prejudice the other party.

For example, in Beeck v. Aquaslide "N" Dive Corp., 67 F.R.D. 411 (M.D. Ill. 1975), the Defendant had filed an Answer admitting that it manufactured the slide on which Plaintiff was injured. Over a year later, Defendant sought leave to amend its Answer to deny that it manufactured the slide. The Court granted leave to amend on the basis that it did not appear that Defendant was acting in bad faith and Plaintiff would not be unduly prejudiced by the amendment.

Similarly, in United Steel Workers of America, A.F.L.-C.I.O. v. Mesker Bros. Industries, Inc., 457 F.2d 91 (8th Cir. 1972), the Plaintiff had alleged in its original Complaint that "in carrying out its collective bargaining obligations" under the terms of a collective bargaining agreement, the Defendant employer had obtained an insurance policy insuring Plaintiff with respect to certain injuries. On the basis of such allegation, the lower Court had dismissed the Complaint because the Complaint itself indicated that the Defendant had complied with its obligations under the collective bargaining agreement to obtain insurance. The Plaintiff moved to amend its Complaint, contending that it was not their intention to imply that the coverage which Defendant had actually obtained did in fact meet the requirements of the collective bargaining agreement. The District Court refused to allow

Plaintiff leave to amend. The Court of Appeals reversed the District Court and allowed Plaintiff leave to amend to clear up any ambiguity.

Finally, in Jackson v. Pacific Gas & Electric Co., 212 P.2d 591 (Cal. 1950), the Plaintiff brought an action to recover for injuries suffered in a truck accident. The original Complaint alleged that an employee/employer relationship existed between Plaintiff and Defendant, which relationship would completely bar Plaintiff's action as the Workmen's Compensation Act provided the exclusive remedy. The lower Court had sustained a demurrer to the Complaint without leave to amend on the basis that Plaintiff could not contradict the allegation of an employer/employee relationship contained in the Complaint. The Appellate Court reversed and granted leave to amend stating:

> "The province and purpose of the law is to ascertain the real facts and to administer justice in the light of such facts. It would seem to be a travesty on justice if a litigant had inadvertently, ignorantly and erroneously stated as a fact, without fault on his part, an admission against interest, if he were to become bound thereby and would not be permitted upon proper showing to correct the innocent error and assert the true fact in that regard. . . .
>
> ". . .
>
> "If courts were to bind litigants to inadvertent untrue statements of facts and forbid them the inherent right to correct faults by substituting the true facts, they would become partisans to miscarriages of justice. Our courts not only permit, but strive to elicit, the true facts of all cases, and to render justice by applying the law to such facts." (Id. at 594-95)

To the same effect, see Macomber v. State of California, 58 Cal.Rptr. 393 (Cal. 1967) ("rules of pleading are conveniences to promote justice and not to impede or warp it."); Avalon Painting Co. v. Alert Lumber Co., 44 Cal.Rptr. 90 (Cal. 1965); Freidberg v. Freidberg, 88 Cal.Rptr. 451 (Cal. 1970); Bank of America v. Lamb Finance Co., 303 P.2d 86 (Cal. 1956) (amendment should be allowed to "clarify ambiguities, amend insufficiencies, eliminate surplusage or explain mistaken statements, if any."); 3 MOORE'S FEDERAL PRACTICE, §15.08[2] at p. 1571.

Nor do the authorities cited by Respondent in support of its contention that Appellants cannot amend to "contradict" the "judicial admission that a joint venture existed" support that position. In Estate of Clarence Henry McFarland v. Holt, 417 P.2d 244 (Ut. 1966), cited by Respondent, the Executrix under a will petitioned for an Order confirming the sale of real property. The Court entered an Order of Confirmation pursuant to such request. The Executrix subsequently sought to set aside such Order on the basis that her own petition filed to confirm the sale had been insufficient. The Court held that her petition had in fact been sufficient and further noted that the Executrix should not thereafter be permitted to repudiate the petition for the purpose of upsetting the action which the Court had taken. That case has nothing to do with amending pleadings. In Myers v. Carter, 556 P.2d 703 (Ore. 1976), cited

by Respondent, the case had actually been tried before a jury with the admission contained in the pleading and no leave to amend was ever sought. Thus, the Court held that it was error to submit the issue to the jury for decision which had already been admitted in the pleadings.

In summary, Appellants do not believe that they alleged in their original Complaints that a joint venture existed. However, if this Court rules otherwise, Appellants should be given the opportunity to amend their Complaints to clarify their previous allegations. Such a ruling would clearly be in the interest of justice as it would result in the determination of the merits of this claim on the facts rather than on the form of the pleadings and there is absolutely no showing that such amendment is being sought in bad faith or that Respondent would be prejudiced in any manner by such amendment.

II. APPELLANTS ARE NOT BOUND BY THE "JOINT VENTURE" LANGUAGE OF THE WRITTEN AGREEMENTS.

Respondent states in its Brief (R.B. 8) that Appellants contend that although the written agreements expressly provide for a joint venture, Appellants should be allowed to introduce evidence that the parties to the agreements intended otherwise. This is a misstatement of Appellants' position. Appellants contend that the terms of the written agreements themselves clearly do not constitute a joint venture, but even if such terms did constitute a joint venture, based upon the authorities cited in our opening Brief (A.B.8-12), Appellants are entitled to introduce evidence that in fact a joint venture was not

intended by the parties and did not in fact exist.

Respondent admits that the provisions of the written agreements are not determinative on the existence of a joint venture between the parties to the written agreements, but argues that the "joint venture" language of the agreements is binding upon Appellants as to Respondent who was not a party to the agreements. The cases cited by Respondent do not support this contention.

In James Weller, Inc. v. Hansen, 517 P.2d 1110 (Ariz. App. 1973), a case cited by Respondent, the Court simply held that although between the parties to a contract their intent to form a joint venture is essential, "as to third parties, the relation will be determined from the facts rather than the conclusions of the co-partners as to the nature of their business relationship." (Id. at 1115) There was no contention that the terms of the written agreement did not accurately set forth the true relationship that existed between the parties. Thus, the Court examined the written contract between the two claimed joint venturers and determined that the agreement by which the house was to be built and sold and the parties were each to receive one-half of the profits from such enterprise in fact constituted a joint venture agreement. In determining that a joint venture existed, the Court set forth the elements of a joint venture as follows:

> "(1) a contract, (2) a common purpose, (3) a community of interest, and (4) an equal right of control. . . .

"It must appear as a part of the agreement either expressly or by necessary implication, that each of the parties to such joint adventure has authority to act for all in respect to the control of the means or agencies employed to execute such common purpose.

". . .

"Where there is a question of a joint adventure, each case must be decided upon its own facts. . ." (Id at 1115)

The Weller Court simply determined from the facts concerning the relationship between the parties that a joint venture existed. Appellants in the case at bar simply ask for the opportunity to factually prove that no joint venture existed.

In Stearns v. Williams, 240 P.2d 833 (Id. 1952), a case cited by Respondent, the Court simply held that as to third persons not a party to the contract, "the legal and not the actual intention controls." (Id. at 839) In other words, as to third persons, even if the parties to the contract did not actually intend to create a joint venture, if the facts show the relationship constitute a joint venture, then as to third parties a joint venture would exist. Again, the Court in Stearns recognized that whether a joint venture existed is primarily a question of fact and that the parties to a joint venture must have a unity of interest in the objects or purposes of the agreement.

In Utah, the circumstances under which a person may be bound as a partner (or a joint venturer) by estoppel even though no partnership in fact existed are spelled out by statute. Section 48-1-13, Utah Code Anno. (1953), provides that where a person represents himself or consents to another

representing him to anyone as a partner, that even though he is not an actual partner he is liable to any person to whom the representation has been made who relied upon such representation in giving credit to the partnership. It is settled under the Utah statute that in order to make one a partner or a joint venturer by estoppel, it is absolutely essential that the third party have relied on the representation of partnership. Phillips Manufacturing Co. v. Putnam, 405 P.2d 1376 (Ut. 1973).

In the present case, it is clear that even if the intention of Appellants and Call Auto is disregarded, the terms of the agreements between the parties and the facts of the relationship that actually existed are not such as to legally constitute a joint venture, but, rather, show a debtor/creditor relationship between the parties. Furthermore, under the Utah statute, it is clear that Respondent in no way relied upon the "joint venture" language in the agreements either in issuing the dealer's bond in favor of Call Auto approximately two years prior to the first transaction with Appellants, or in continuing that bond in effect.

III. APPELLANTS DID TIMELY MOVE FOR LEAVE TO AMEND THEIR COMPLAINTS IN THE COURT BELOW.

Respondent argues that Appellants did not move for leave to amend their Complaints prior to the entry of the Orders of Dismissal and that even though Appellants' Motions for

Reconsideration or Modification stated as ground for the Motions that Appellants were entitled to amend the Complaints, such motions were improper and leave to amend could not have been granted by the Court both because the Court could not properly reconsider its prior ruling and because leave to amend a Complaint cannot be granted after the Complaint has already been dismissed. These contentions are without merit.

First, Appellants' counsel did in fact, at the hearing on Respondent's Motion to Dismiss, request leave to amend the Complaints in the event the District Court felt that the original Complaints were defective. When, after taking the matter under advisement, the District Court granted the Motions to Dismiss with Prejudice, Appellants immediately filed a "Motion for Reconsideration or Modification of Order Granting Motion to Dismiss", in which Appellants sought once again leave to amend the Complaints in the event the Court felt the Complaints were deficient. The Trial Court denied these motions. Only then did the Court direct the entry of final judgments of dismissal of the Complaints against Respondent.

Under Utah Rules of Civil Procedure, Rule 54(b), it is clear that until the Court directed the entry of final Judgment in favor of Respondent based upon an express determination that no just reason existed for delay, that the Court was free to allow Appellants to amend their Complaints or to revise its previous Orders in any respect as the previous Orders of the Court did not dispose of all of the claims of all parties to the action.

IV. THE LOANS MADE BY APPELLANTS WERE NOT USURIOUS AND EVEN IF THE LOANS WERE USURIOUS RECOVERY IS NOT BARRED.

Respondent's final argument is that even if the Appellants were not joint venturers with, but rather loaned money to, Call Auto, Appellants are barred from recovery because under the provisions of the Utah Uniform Consumer Credit Code the loans were supposedly "consumer related" loans, and, therefore, usurious, void and unenforceable because the finance charge exceeded 18%. With respect to Mr. and Mrs. Lowin, for example, Respondent argues that even though they loaned Call Auto $30,000.00 and were repaid only $750.00, that they are barred from any recovery in this action.

It simply is not true that the loans made by Appellants to Call Auto & Equipment Sales, Inc. were "consumer related" loans. Section 70B-3-602(1), Utah Code Ann. (1953), defines "consumer related loans" as:

> ". . . a loan which is not subject to the provisions of this act applying to consumer loans and in which the principal does not exceed $25,000.00; if the debtor is a person other than an organization." [Emphasis added]

The loans in this action were solicited by Call Auto, the interest rates were set by Call Auto without negotiation, the loans were made to Call Auto and the loan agreements were executed by Call Auto. Respondent attempts to avoid the fact that the loans were made to a corporation, arguing that the loans were in fact made to the individual Defendants because Appellants allege in their Complaints, upon information and belief, that at all relevant times Call Auto was the alter ego

of the individual Defendants and the separate entity of that corporation should be disregarded. This argument is a non sequitur. The fact that the individual Defendants may have failed to observe the required corporate formalities and that the Court may find that it would sanction a fraud or promote injustice to recognize the separate corporate entity insofar as liability to Appellants is concerned, has nothing to do with the existence of the corporation to whom Appellants made the loans as a legal entity for other purposes. A party certainly cannot avoid liability for a loan by his own formation and operation of a sham corporation.

Moreover, even if the loans had been usurious that fact would not render them void and unenforceable as contended by Respondent. The sole authority cited by Respondent for this proposition, Ross v. Producers Mutual Co., 295 P.2d 339 (Ut. 19 provides absolutely no support for Respondent's claim. In Ross, the Court held that the fact that an insurance company had violated §31-27-15 U.C.A., in issuing a policy, did not render the entire contract of insurance void. In reaching that conclusion, this Court noted that in determining whether violation of a statute renders a contract void, the primary consideration is whether the statute construed as a whole indicates the Legislature intended such a result. In a footnote the Court cited as an example of a statute which contained an express provision rendering such a contract void, Utah's former Usury Statute, 15-1-6, U.C.A. However, that statute was repealed

in 1955.[4]

In fact, the remedies available to one paying usurious interest are expressly spelled out in the Utah Uniform Consumer Credit Code. Section 70B-5-202(3), Utah Code Ann. (1953), provides that the debtor is entitled to a refund of the excess charge and, under Section 70B-5-202(4), the debtor can recover a penalty if the demand for refund is not complied with in a reasonable time. Section 70B-5-202(5) goes on to make it clear that the loan is not void by providing that, "Except as otherwise provided, no violation of this Act impairs rights on a debt."

Call Auto solicited and obtained loans from Appellants and numerous other people at the excessive interest rates set by Call Auto without negotiation. Certainly, Appellants and the other parties who loaned money to Call Auto were naive and gullible to believe that Call Auto could or would repay their money let alone pay such interest rates. However, that fact certainly should not preclude Appellants from recovery and neither Call Auto nor Respondent can avoid liability on the basis that the loans were usurious.

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[4] In an apparent attempt to prejudice the Court, Respondent cites §70B-5-301, Utah Code Anno. (1953), as making it a misdemeanor to willfully charge more than the usury limit. However, the statute only applies to a person who engages in the business of making consumer loans and is clearly inapplicable to Appellants.

CONCLUSION

Appellants simply ask to be given the opportunity to prove at trial what is not disputed by any of the parties to the transactions, i.e., that Appellants made secured loans to Call Auto & Equipment Sales, Inc., and that the parties neither intended to nor did in fact enter into a joint venture with respect to Call Auto's business. Even the cases cited by Respondent in its Brief demonstrate that the existence of a joint venture is a factual question which must be answered by an examination of the entire relationship of the parties. Such a factual inquiry is clearly in the interest of justice and the inquiry should not be artificially limited because of the use of the term "type of joint venture" in Call Auto's form agreements or because the Betenson Complaint may not be entirely clear as to whether a joint venture is alleged.

DATED this 20th day of August, 1981.

Respectfully submitted,

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